

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Use of Portions of Returned 2 GHz Mobile)	IB Docket No. 05-220
Satellite Service Frequencies)	
)	IB Docket No. 05-221

To: The Commission

**REPLY COMMENTS OF CINGULAR WIRELESS LLC IN IB DOCKET 05-220
AND COMMENTS IN IB DOCKET 05-221**

Cingular Wireless LLC (“Cingular”), by its attorneys, hereby submits comments in the captioned companion proceedings. In IB Docket No. 05-220, the FCC has stated its intent to increase by a total of 10.67 MHz the spectrum holdings of two non-operational MSS licensees, ICO Satellite Services (“ICO”) and TMI Communications and Company, Limited Partnership (“TMI”).¹ In IB Docket No. 05-221, the FCC has asked whether to give TMI and ICO an additional 13.33 MHz of spectrum (24 MHz total), or whether to reallocate that spectrum or make it available to new MSS entrants.² Cingular agrees with commenters that neither TMI nor ICO has justified a 10.67 MHz giveaway – let alone a 24 MHz giveaway.³ To the contrary, the record shows the spectrum is highly valued for other uses. Indeed, TMI and ICO seek the

¹ *Public Notice*, Commission Invites Comments Concerning Use of Portions of Returned 2 GHz Mobile Satellite Service Frequencies, FCC 05-133, IB Docket No. 05-220 (rel. June 29, 2005) (“*Public Notice*”).

² *Public Notice*, Commission Invites Comments Concerning Use of Portions of Returned 2 GHz Mobile Satellite Service Frequencies, FCC 05-134, IB Docket No. 05-221 (rel. June 29, 2005).

³ See Comments in IB Docket 05-220 of CTIA – The Wireless Association™ (“CTIA”) at i-ii, 5-14; Inmarsat Ventures Limited (“Inmarsat”) at 15-25; T-Mobile USA, Inc. (“T-Mobile”) at 2-4; *see also* Comments of Sirius Satellite Radio Inc. (“Sirius”) in IB Docket 05-220 at 3.

additional spectrum for future terrestrial (“ATC”) operations that they presently do not have the authority to provide. Accordingly, the unassigned spectrum should be reallocated in a rulemaking to flexible, terrestrial use and assigned by means of auction to ensure its highest and best use.

DISCUSSION

Cingular agrees with CTIA that TMI and ICO bear an extremely high burden to justify that the spectrum giveaway they seek is in the public interest.⁴ First, as proposed, the giveaway would occur in the absence of an auction which, if employed, would ensure the spectrum is used effectively and efficiently.⁵ Second, the FCC has already found that “five megahertz of spectrum . . . is sufficient for commencement of service,”⁶ yet TMI and ICO already have 8 MHz – providing each with 3 MHz for system expansion.⁷ Third, the FCC has indicated that abandoned spectrum “may be available for expansion of systems that are operational,”⁸ but neither is

⁴ See Comments of CTIA in IB Docket 05-220 at 5-8. The FCC proposes to modify the spectrum assignments of TMI and ICO pursuant to Section 316 of the Communications Act. The D.C. Circuit has explained that Section 316 “explicitly restrict[s] the Commission’s authority to modify a license” to situations where the modification is “in the public interest, convenience and necessity.” *California Metro Mobile Communications v. FCC*, 365 F.3d 38, 45 (D.C. Cir. 2004).

⁵ See Comments of CTIA in IB Docket 05-220 at 5-6.

⁶ *Establishment of Policies and Service Rules for MSS in the 2 GHz Band, Report and Order*, 15 F.C.C.R. 16127, 16138 ¶ 17 (2000) (“2 GHz Order”).

⁷ See Comments in IB Docket 05-220 of CTIA at 6; Inmarsat at 21; T-Mobile at 3. Moreover, as Sirius notes, both TMI and ICO are authorized to operate their MSS systems outside their selected assignments on a secondary basis, providing them with additional spectrum resources. See Comments of Sirius in IB Docket 05-220 at 4 n.14; see also *Flexibility for the Delivery of Communications by MSS Providers, Report & Order*, 18 F.C.C.R. 1962, 2009 ¶ 89 (2003) (“ATC Order”) (emphasis added), *recon.*, 18 F.C.C.R. 13590 (2003), *further recon.*, 20 F.C.C.R. 4616 (2005).

⁸ 2 GHz Order, 15 F.C.C.R. at 16139 ¶ 18.

operational and each is years away from commencing service.⁹ Finally, the FCC adopted ATC to allow more efficient use of “the same amount of spectrum,”¹⁰ yet TMI seeks more spectrum “[t]o deploy a modern ATC network.”¹¹ As discussed below, neither TMI nor ICO has justified the additional spectrum it seeks,¹² and therefore the record does not provide a reasoned basis for the FCC to conclude that the spectrum giveaway is in the public interest.¹³

TMI’s “showings” in support for its claimed need for an additional 12 MHz of spectrum are fundamentally flawed. Most importantly, they include *no projections of customer demand or anticipated traffic levels* to justify any additional spectrum – a key showing underlying prior FCC decisions to provide access to more spectrum.¹⁴ Instead, the showings are based on the backwards logic that large equipment orders must be placed with multiple manufacturers to keep equipment costs low, which in turn necessitates a customer base of up to 25 million customers.

⁹ See Comments in IB Docket 05-220 of CTIA at 6; Inmarsat at 15-18; Sirius at 3, 5; T-Mobile at 2-3.

¹⁰ *ATC Order*, 18 F.C.C.R. at 1974 ¶ 20.

¹¹ Letter from Gregory C. Staple, Vinson & Elkins, Counsel for TMI, and Jonathan D. Blake, Covington & Burling, Counsel for TerreStar, to Donald Abelson, Chief, International Bureau, FCC, at 7 (Apr. 20, 2005); see also Comments in IB Docket 05-220 of CTIA at 7-8; Inmarsat at 4, 18-20, 24, 28.

¹² See Comments of CTIA in IB Docket 05-220 at 8-14.

¹³ Agency action must rest on reasoned decisionmaking in which “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); see 5 U.S.C. § 706(2)(A) (precluding arbitrary and capricious decisionmaking). Courts will not uphold an agency’s action “where it has failed to offer a reasoned explanation that is supported by the record.” See *AT&T v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir. 1992); cf. Comments of T-Mobile in IB Docket No. 05-220 at 6 (describing the *Public Notice* as “deficient” because it “provid[es] no analysis or justification” for the intended spectrum giveaway).

¹⁴ See Comments in IB Docket 05-220 of CTIA at 9-10; Sirius at 3; see also Comments of Inmarsat in IB Docket No. 05-220 at 25.

No evidence is submitted that such a customer base is even remotely possible.¹⁵ TMI also claims to need such a large customer base to make full utilization of its satellite power but, as Inmarsat points out, satellite design choices are business decisions and not a basis for an award of spectrum.¹⁶ This empty “if we build it, they will come” theory simply cannot form the basis of a valuable spectrum giveaway.¹⁷

With respect to ICO, it has submitted *nothing* in the record to support its claimed need for additional spectrum.¹⁸ Cingular agrees that empty statements without support simply cannot form a reasoned basis to give ICO up to 12 MHz of additional valuable spectrum.¹⁹

¹⁵ To put the TMI figure in context, MSS providers collectively today have at most a domestic customer base of several hundred thousand customers. *See Compatibility with Enhanced 911 Emergency Calling Systems, Report and Order and Second Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 25340, 25356 n.129 (2003) (“[A]necdotal evidence suggests that domestic MSS subscribers number in the hundreds of thousands.”); *cf. Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Ninth Report*, 19 F.C.C.R. 20597, 20670 ¶ 180 (2004) (noting that subscribers to MSS services *worldwide* numbered only 885,000 in 2004). Assuming, *arguendo*, Mobile Satellite Ventures, Globalstar LLC, TMI and ICO all proceed with plans to offer MSS/ATC services, up to 100 million MSS/ATC customers would be predicted using TMI’s reverse logic. Assuming a generous domestic MSS customer base of 500,000 domestic subscribers, TMI is predicting an MSS/ATC customer base *200 times* larger than today’s MSS customer base – with utterly no economic or market data to support the prognostication.

¹⁶ *See* Comments of Inmarsat in IB Docket 05-220 at 21-23.

¹⁷ *Id.* at 25; *see J & W Mobile Radio Association*, 15 F.C.C.R. 1893, 1897-98 ¶ 11 (WTB/PSPWD 2000) (“[T]he Applicants rely on an unsubstantiated ‘build it and they will come’ approach. Unfortunately this approach does not ensure that the large number of channels requested will be efficiently used, if used at all. . . . [B]ecause they have not provided user information, we find that the Applicants have not justified the number of channels sought.”); *Interactive Video and Data Services*, 7 F.C.C.R. 1630 (1992) (Concurring Statement of Commissioner James H. Quello) (“We are approaching this allocation, or more appropriately stated reallocation, with a Field of Dreams concept that if you build it they will come. Spectrum is far too valuable and in demand to reallocate on such a basis.”); *see also* Comments of T-Mobile in IB Docket No. 05-220 at 3 & n.7.

¹⁸ *See* Comments in IB Docket 05-220 of CTIA at 13-14; Inmarsat at 20. In its comments, ICO simply repeats prior, unsubstantiated claims made before the advent of ATC and the modification of its multi-satellite constellation to a single geostationary satellite. *Compare* Comments of ICO in IB Docket 05-220 at 1-2 & n.3 *with* Comments of CTIA in IB Docket 05-220 at 13-14.

What the record does show is that TMI and ICO are seeking additional spectrum for their *terrestrial* ATC operations.²⁰ When the Commission authorized ATC, however, it did so based on the premise that “MSS ATC proponents *do not seek additional access to spectrum*”; to the contrary, ATC was intended to “grant[] MSS providers the ability to provide more and better services with the *same amount of spectrum*.”²¹ Indeed, as Inmarsat noted, the FCC expressly agreed with TMI’s affiliate, MSV, that “parties could not legitimately identify terrestrial ATC usage to justify a larger MSS satellite spectrum assignment.”²² Terrestrial spectrum needs, therefore, cannot form the basis for a mobile *satellite* spectrum giveaway.²³

Because the spectrum is sought for terrestrial use, it should be reallocated in a rulemaking to flexible, terrestrial use services and made available at auction.²⁴ This would allow the market to determine the best use of the spectrum by allowing the participation of all interested parties, including MSS providers. As the Commission has previously acknowledged, MSS licensees

¹⁹ See Comments of CTIA in IB Docket 05-220 at 14. Rydbeck Consulting submitted brief comments advocating giving TMI and ICO each a *pro rata* 20 MHz MSS assignment “for future proofing against broadband obsolescence.” Comments of Rydbeck in IB Docket 05-220 at 2. This is not a showing of need and no support for this conclusory statement was provided.

²⁰ See Comments in IB Docket 05-220 of CTIA at 2-3, 5, 9, 12; Inmarsat at 4, 18-20, 24, 28; T-Mobile at 4 n.11.

²¹ *ATC Order*, 18 F.C.C.R. at 1974 ¶ 19 (emphasis added).

²² See *id.* at 2067 ¶ 215, *cited in* Comments of Inmarsat in IB Docket No. 05-220 at 19. ICO similarly has stated (at a time when it was authorized for less spectrum than it holds today) that “ATC use . . . may alleviate the need for the full amount of spectrum that is currently set aside for spectrum expansion.” Comments of New ICO Global Communications in ET Dockets 00-258 & 95-18 & IB Docket No. 99-81 at 29 (Oct. 22, 2001), *cited in* Comments of CTIA in IB Docket No. 05-220 at 7.

²³ See Comments of Inmarsat in IB Docket No. 05-220 at 24 (“[C]onsiderations regarding the deployment of ATC . . . are simply not germane to whether TMI should be entitled to additional MSS spectrum.”).

²⁴ See Comments of T-Mobile in IB Docket No. 05-220 at 8.

would be able to acquire terrestrial spectrum reallocated from MSS at auction “in order to provide additional terrestrial services that would complement their MSS (and ATC) offerings.”²⁵

Accordingly, the FCC should commence a rulemaking to examine the best use of all 24 MHz of unassigned 2 GHz MSS spectrum,²⁶ consistent with its spectrum management obligations “to ensure that the [2 GHz] spectrum is used efficiently and effectively.”²⁷ Such consideration should include reallocation of the unassigned spectrum in light of record evidence that the spectrum is highly valued for other services, including AWS.²⁸ Reallocation is particularly appropriate if, as appears to be the case, TMI and ICO seek to use the unassigned

²⁵ *New Advanced Wireless Services, Sixth Report and Order, Third Memorandum Opinion and Order, and Fifth Memorandum Opinion and Order*, 19 F.C.C.R. 20720, 20742 ¶ 46 n.94 (2004); *see also Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands, Notice of Proposed Rulemaking*, 19 F.C.C.R. 19263, 19271 ¶ 17 (2004) (proposing to accept competing applications for MSS spectrum reallocated to AWS and auction the spectrum pursuant to Section 309(j) of the Act).

²⁶ *See* Comments in IB Docket No. 05-220 of Sirius at 4; T-Mobile at 4-7; *see also* CTIA at 16. Cingular agrees with Sirius that “[t]he current bifurcated process . . . is inefficient . . . and unnecessarily constrains both public input and the FCC’s review.” *See* Comments of Sirius in IB Docket No. 05-220 at 4. As the FCC has previously noted, “a rulemaking proceeding is generally a better, fairer and more effective method of implementing a new industry-wide policy than is the ad hoc and potentially uneven application of conditions in isolated proceedings affecting or favoring a single party.” *Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, 17 F.C.C.R. 9614, 9699 ¶ 218 (2002).

²⁷ *New Advanced Wireless Services, Third Report and Order*, 18 F.C.C.R. 2223, 2238 ¶ 29 (2003) (“AWS Third R&O”); *see* Comments in IB Docket No. 05-220 of CTIA at 4; T-Mobile at 8.

²⁸ *See* Comments in IB Docket No. 05-220 of CTIA at 3-4; T-Mobile at 7-8; Sirius at 4 n.14; *see AWS Third R&O*, 18 F.C.C.R. at 2238 ¶ 29 (describing “the reallocation of spectrum” as one of the Commission’s tools for ensuring that abandoned MSS spectrum is used efficiently and effectively). The question of whether a portion of the spectrum should be reserved for true MSS system expansion by an operational system should be considered in a rulemaking.

spectrum for terrestrial operations.²⁹ Spectrum reallocated from MSS should be made available at auction to all interested parties to ensure its highest and best use.³⁰

There is no reason to avoid a rulemaking and rush to judgment on the basis of a record constrained by an unnecessarily abbreviated comment cycle and an artificially bifurcated proceeding. TMI and ICO are years away from commencing operations and therefore have no immediate spectrum needs.³¹ They seek additional spectrum now only to “facilitate their ability to attract capital investment and execute their business plans.”³² This is not a basis, however, for a spectrum giveaway; as the Commission made clear in licensing ICO and TMI in the first instance, they should “succeed or fail *on their own merits*.”³³

²⁹ See Comments of CTIA in IB Docket No. 05-220 at 5, 16.

³⁰ See 47 U.S.C. § 309(j); see also *Improving Public Safety Communications in the 800 MHz Band*, 19 F.C.C.R. 14969, 15081 ¶ 213 (2004) (stating that “Congress has expressed a strong statutory preference in the vast majority of circumstances for use of auctions to assign spectrum rights” and “the granting of valuable spectrum rights . . . to any party . . . without recourse to the competitive bidding process is highly unusual”).

³¹ See Comments in IB Docket No. 05-220 of CTIA at 16 & n.71; Inmarsat at 31; Sirius at 5; Cf. *Review of Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit MSS Systems in the 1.6/2.4 GHz Bands*, Notice of Proposed Rulemaking, 18 F.C.C.R. 1962, 2089 ¶ 266 (2003).

³² Comments of ICO in IB Docket No. 05-220 at 5.

³³ *ICO Services Limited*, 16 F.C.C.R. 13762, ¶ 31 (IB 2001) (emphasis added); see *TMI Communications and Company, Limited Partnership*, 16 F.C.C.R. 13808, ¶ 19 & n.46 (IB 2001).

CONCLUSION

For the foregoing reasons, the unassigned 2 GHz MSS spectrum should be reallocated in a rulemaking to an auctionable, flexible use service that would allow the market to decide the highest and best use of the spectrum.

Respectfully submitted,

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